Bank Kerjasama Rakyat Malaysia Bhd v MDSA Ventures Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-1748–11 OF 2023
YUSRIN FAIDZ JC
7 FEBRUARY 2025

Civil Procedure — Summary Judgment — Loan facility — Bank applied for summary judgment under O 14 Rules of Court 2012 for the outstanding amount due under term loan it had granted borrower which latter had failed to repay — Whether borrower and guarantors of loan failed to raise any triable issue to defeat the application

The plaintiff in the instant action applied for summary judgment under O 14 of the Rules of Court 2012 against the first defendant ('D1') borrower and the second and third defendant guarantors for the sum of RM82,516,398.43, being the amount outstanding under an Islamic term loan ('the facility') the plaintiff had granted and disbursed to D1. The plaintiff had terminated the loan agreement and recalled the facility when D1 failed to make the monthly repayments it was obliged to make under the loan agreement. The defendants raised various issues in an attempt to show that there were triable issues which warranted a full trial of the action.

Held, granting summary judgment against the defendants for the sum of RM82,516,398.43 as at 6 November 2023 with the applicable ta'widh (compensation charges):

(1) The defendants had not raised any triable issue that warranted further judicial scrutiny (see paras 30, 46, 58 & 76).

(2) The defendants' responses to the plaintiff's letters of demand and the termination of the facility agreement showed that they had unconditionally admitted to the debt and had requested the plaintiff not to terminate the banking facility (see para 55).

(3) D1's letters dated 1 June 2023 and 16 November 2023 constituted an unequivocal admission as they were not marked 'without prejudice' and were not made in the context of a genuine dispute between the parties. Instead, these letters merely reflected D1's request for the reinstatement of the banking facility coupled with an appeal for a variation in payment terms and an extension of time for payment (see paras 57–58).

(4) The parties had agreed that in the absence of manifest error, the amount stated as due in the plaintiff's certificate of indebtedness would be

conclusive proof of the amount owing by the defendants under the facility agreement. Based on the evidence and a through scrutiny of the certificate of indebtedness and after comparing it with the amounts claimed during the demand for arrears and upon termination, the court found no manifest error in the certificate and that the calculation of the charges was free from any element of negligence, misconduct or breach of the terms and conditions in the facility agreement (see paras 60, 71 & 76).

[Bahasa Malaysia summary

Plaintif dalam tindakan semasa telah memohon penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah 2012 terhadap peminjam defendan pertama ("D1") dan defendan kedua serta ketiga selaku penjamin bagi jumlah sebanyak RM82,516,398.43 iaitu jumlah yang masih terhutang di bawah kemudahan pembiayaan Islamik ('kemudahan tersebut') yang telah diberikan dan dibayar oleh plaintif kepada D1. Plaintif telah menamatkan perjanjian pembiayaan tersebut dan memanngil semula kemudahan tersebut berikutan kegagalan D1 untuk membuat bayaran ansuran bulanan seperti yang diwajibkan di bawah perjanjian tersebut. Defendan telah membangkitkan pelbagai isu bagi menunjukkan wujudnya isu boleh dibicarakan yang memerlukan perbicaraan penuh.

Diputuskan, membenarkan penghakiman terus terhadap defendan bagi jumlah RM82,516,398.43 setakat 6 November 2023 berserta ta'widh yang berkenaan (caj pampasan):

(1) Defendan tidak berjaya membangkitkan sebarang isu boleh dibicarakan yang memerlukan penelitian kehakiman lanjut (lihat perenggan 30, 46, 58 dan 76).

(2) Respons defendan terhadap surat tuntutan plaintif dan penamatan perjanjian kemudahan menunjukkan bahawa mereka telah secara tanpa syarat mengakui hutang tersebut dan telah merayu agar plaintif tidak menamatkan kemudahan perbankan berkenaan (lihat perenggan 55).

(3) Surat-surat D1 bertarikh 1 Jun 2023 dan 16 November 2023 merupakan satu pengakuan yang jelas dan tegas memandangkan ianya tidak ditandakan sebagai 'tanpa prejudis' dan tidak dibuat dalam konteks pertikaian sebenar antara pihak-pihak. Sebaliknya, surat-surat tersebut hanyalah suatu permohonan D1 untuk pemulihan semula kemudahan perbankan disertai dengan rayuan agar terma bayaran diubah dan tempoh pembayaran dilanjutkan (lihat perenggan 57–58).

(4) Pihak-pihak telah bersetuju bahawa sekiranya tiada kesilapan nyata, jumlah yang dinyatakan dalam sijil keberhutangan yang dikeluarkan oleh plaintif akan menjadi bukti muktamad terhadap jumlah yang terhutang oleh para defendan di bawah perjanjian kemudahan tersebut.

Berdasarkan keterangan dan penelitian terperinci terhadap sijil keterhutangan tersebut dan setelah membandingkannya dengan jumlah yang dituntut semasa tuntutan tunggakan dan semasa penamatan, Mahkamah mendapati tiada kesilapan nyata dalam sijil tersebut dan bahawa pengiraan caj yang dikenakan adalah bebas daripada sebarang unsur kecuaian, salah laku atau pelanggaran terhadap terma dan syarat dalam perjanjian kemudahan (lihat perenggan 60, 71 dan 76).]

Cases referred to

Amey Birmingham Highways Ltd v Birmingham City Council [2018] EWCA Civ 264, CA (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)
Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris [1973] 2 Lloyd's Rep 437, CA (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, FC (refd)
Bradford & Bingley plc v Rashid [2006] 4 All ER 705, HL (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
CIMB Bank Bhd v Comsa Layer Farms Sdn Bhd & Anor [2011] 2 MLJ 118, HC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643, HC (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)
Flowgroup plc (in liquidation) v Co-Operative Energy Ltd [2021] EWHC 344 (Comm), QBD (refd)
JKT Petroleum Sdn Bhd & Ors v T & O Resources Sdn Bhd [2016] 7 MLJcon 52, HC (refd)
Malayan Banking Berhad v Red Box (Malaysia) Berhad [2000] MLJU 108, HC (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183, SC (refd)
Malaysia Airports Sdn Bhd v APFT Land Sdn Bhd [2018] 10 MLJ 257, HC (refd)
Maybank Islamic Bhd v Golden Base Construction Sdn Bhd & 2 Ors (W-02(IM)(MUA)-1035–06 of 2019) (unreported), CA (folld)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (refd)
Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd [2014] 2 SLR 1342, HC (refd)

Legislation referred to

Federal Constitution Ninth Schedule, List I, item 7(j)
Islamic Financial Services Act 2013 ss 28, 281
Rules of Court 2012 O 14, O 14 rr 1, 3

Muhammad Nasim Shafie (Sidek, Teoh, Wong & Dennis) for the plaintiff.
Khor Poay Ying (CH Tay & Partners) for the defendant.

Yusrin Faidz JC:

INTRODUCTION

[1] This matter arises from the plaintiff's application in encl 30 made pursuant to O 14 r 1 of the Rules of Court 2012 ('the Rules'). The plaintiff alleges that the first defendant ('D1') has failed to fulfill its repayment obligations under a banking facility, while the second and third defendants ('D2' and 'D3') are sued in their capacity as guarantors of D1's contractual performance. The plaintiff contends that this is a clear-cut case warranting immediate adjudication without trial, asserting an absence of genuine disputes necessitating further scrutiny. In opposition, the defendants vigorously contest the application, maintaining that substantive factual and legal complexities exist, which merit full exploration through trial proceedings. At the heart of this court's inquiry lies a critical determination: whether the defendants have sufficiently demonstrated the presence of a bona fide triable issue that would preclude summary adjudication or, conversely, whether the plaintiff has established an unequivocal legal entitlement to judgment under the stringent standards of O 14.

BACKGROUND FACTS

[2] D1, a client of the plaintiff bank, sought to refinance an existing loan from MBSB Bank Berhad to fund the development of its construction project, Imperio Residence @ Hatten City, located in Malacca. Based on an offer letter dated 10 October 2019, the plaintiff granted D1 with an Islamic Term Financing Facility based on *Tawarruq* (commodity murabahah) for the sum of RM60m ('the said banking facility'). At D1's request, and pursuant to a supplementary letter of offer (restructuring) dated 5 October 2020, second supplementary letter of offer dated 22 June 2021, third supplementary letter of offer dated 29 October 2021, and fourth supplementary letter of offer dated 8 September 2022, the said banking facility was restructured to RM58.8m (see pp 2–53 of exh NBN1 of encl 31).

[3] The commitment of the parties to the facilities was further evidenced by the concomitant execution and/or issuance of the following documents:

(a) facility agreement executed by D1 on 11 November 2019;

(b) supplemental facility agreement executed by D1 on 8 September 2020;

(c) purchase request and undertaking to purchase executed by D1 dated 11 November 2019;

(d) purchase request and undertaking to purchase (restructuring) executed by D1 dated 25 November 2020;

(e) *wakalah* agreement executed by D1 on 11 November 2019;

(f) *wakalah* agreement (restructuring) executed by D1 on 25 November 2020;

(g) *murabahah* sale contract executed by D1 on 11 November 2019 evidencing the *murabahah* sale price of RM85,8847,239.80;

(h) *murabahah* sale contract (restructuring) executed by D1 on 25 November 2020 evidencing the restructured *murabahah* sale price of RM91,338,846.27;

(i) joint and several guarantees executed by the D2 and D3 on 11 November 2019, 19 November 2020 and 25 November 2020 ('the said guarantees');

(j) notification letter dated 5 October 2020; and

(k) second notification letter dated 8 September 2022;

[4] The plaintiff has accordingly disbursed the said banking facility to D1, and D1 has utilised the same. However, D1 subsequently failed, neglected, and/or refused to make the overdue monthly payments. Consequently, the plaintiff, through Messrs Sidek Teoh Wong & Dennis, issued a demand dated 5 May 2023 claiming the arrears of RM917,607.73 as at 5 May 2023 (see exh NBN6 of encl 33).

[5] As D1 failed to adhere to the demand, the plaintiff has through Messrs Sidek Teoh Wong & Dennis, issued a notice of termination dated 7 November 2023 and claimed for the outstanding amount of RM82,516,398.43 as at 6 November 2023 (see exh NBN7 of encl 33). A statement of account was issued by the plaintiff pursuant to the relevant clauses under the facility agreements as well as the guarantees (see exh NBN8 of encl 34); evidencing the same outstanding sum.

[6] On 24 November 2023, the plaintiff commenced proceedings against the defendants by filing a writ and statement of claim. The defendants filed their defence on 15 January 2024.

[7] On 27 May 2024, the defendants' application (encl 19) to strike out the plaintiff's writ and statement of claim was dismissed by this court.

[8] On 9 July 2024, the plaintiff applied for summary judgment under O 14 r 1 of the Rules (encl 30), wherein upon considering the cause papers and

submissions filed I had on 25 October 2024 allowed the entry of final judgment against the defendants for the sum of RM82,516,398.43 as at 6 November 2023, with the applicable *ta'widh* and costs of RM8,000.

ISSUES

[9] The application in encl 30 addresses the following issues:

(a) whether the plaintiff has complied with the procedural requirement of summary judgment application ('procedural requirement'); and

(b) whether the defendants have successfully raised genuine disputes of material fact that require a trial ('defendants showing cause').

Procedural requirement

[10] The first issue before the court is whether the requisite preconditions for granting summary judgment have been met. In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 (FC), the Federal Court held that:

> For the purpose of an application under Order 14 the preliminary requirements are:
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> (a) the defendant must have entered an appearance;
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> (b) the statement of claim must have been served on the defendant; and
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> (c) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
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> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him ...

[11] The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 (FC) held that:

> [5] Quite clearly, the Court of Appeal has put the burden on the plaintiff to prove his case in an O 14 application. With respect, that cannot be the correct proposition of law. In an application under O 14, the burden is on the plaintiff to establish the following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r 2 of O 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim (see *Supreme Leasing Sdn Bhd v Dior Enterprise & Ors* [1990] 2 MLJ 36). *Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite.* (Emphasis added.)

[12] This is in line with the preconditions set out in O 14 r 1 of the Rules which read as follows:

> (1) Where in an action to which this rule applies a *statement of claim has been served on a defendant and that defendant has entered an appearance* in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, *apply to the court for judgment against that defendant.*
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> (2) Subject to paragraph (3), this rule applies to every action begun by writ other than one which includes —
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> (a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or
>
> (b) a claim by the plaintiff based on an allegation of fraud.
>
> (3) This order shall not apply to an action to which O 81 applies. (Emphasis added.)

[13] The fundamental principle of summary judgment is to streamline litigation by resolving cases without the need for a full trial when no genuine disputes of material fact exist. Although summary judgment can greatly reduce time and costs, its improper use could jeopardise a party's constitutional right to due process and a fair trial. To prevent such potential prejudice, the Rules require strict compliance with notice requirements, ensuring the opposing party is given adequate opportunity to respond. This principle is aptly summarised by Hashim Yeop Sani SCJ in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (SC) at p 183, where it was held:

> (4) The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to the judgment. Order 14 is not intended to shut out the defendant. The jurisdiction should only be exercised in very clear cases.

[14] Based on the facts of the case, I am of the view that the plaintiff has fulfilled all the requirements for O 14 r 1 of the Rules ie where the defendant have entered appearance on 18 December 2023, and the deponent to the plaintiff's affidavit in support dated 9 July 2024 has affirmed and verily believe that there is no defence to the plaintiff's claim. As to the requirement of service of writ and statement of claim, although no affidavit of service was filed, the filing of the memorandum of appearance as well as the statement of defence shows that the defendants were properly served. The burden therefore shifts to the defendants to satisfy the court why judgment should not have been given against them.

Defendants showing cause

[15] Upon shifting of this burden, O 14 r 3 of the Rules requires the defendant satisfy the following:

> (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that *there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial* of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.
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> (2) The Court may by order, and subject to such conditions, if any, as may be just, stay the execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action. (Emphasis added.)

[16] The burden which is shifted to the defendant is a tactical one. This is succinctly described in the Singapore High Court case of *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 (HC) at paras [45] to [47], wherein Vinodh Coomaraswamy J held as follows:

> [45] I should point out, however, that *the burden which shifts to the defendant upon a prima facie case being shown is the burden on the application or a tactical burden, not the legal or even an evidential burden of proof.* It would be anomalous for a defendant to bear the legal burden of proof on a summary judgment application when at trial, that burden explicitly rests on the plaintiff. And *the fact that it is for the plaintiff first to show a prima facie case with knowledge of and in light of the defences raised makes clear that no evidential burden rests on the plaintiff. It is no part of the policy underlying summary judgment to reverse a plaintiff's burden of proof.*
>
> [46] The policy underlying summary judgment is twofold and comprises a private and a public element. First, summary judgment enables a plaintiff with a strong claim to secure a judgment in a period of time and at an expense which is proportionate to the dispute. Second, summary judgment proceedings enables the court to conserve scarce public resources where there is no reasonable or fair probability that deploying those resources in a full trial would make a difference to the just determination of the dispute.
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> [47] Thus, *although it is useful shorthand to speak in terms of the burden of proof shifting to the defendant, the fact remains that the court will grant summary judgment if the plaintiff shows after all the evidence is in that the there is no fair or reasonable probability that the defendant has a real or bona fide defence and (only if the defendant raises this point) that there is no other reason why there ought to be a trial.*(Emphasis added.)

[17] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (FC), the Federal Court held that where an assertion, denial or dispute is equivocal, or lacking precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then such assertion or denial will be rejected, thereby

rendering the issue not triable. In other words, leave to defend will not be granted based upon 'mere assertions' by defendant; instead, the court will look at the whole situation critically to examine whether the defence is credible.

[18] In the Privy Council case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (PC), at p 217, Lord Diplock explained it as thus:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as 'he may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

[19] It is trite that the affidavit in opposition to the summary judgment must condescend upon particulars and directly address the claimant's claims and supporting affidavit. In essence, it should clearly articulate the defendant's defense along with the factual foundation underpinning it. The affidavit must provide adequate details to reveal the existence of a genuine dispute warranting a trial. Mere blanket denials of the plaintiff's claims are insufficient to meet this standard.

[20] Having outlined the foregoing principles, we now turn to consider the issues raised by the defendants in opposition to the plaintiff's application for summary judgment.

Whether the plaintiff is allowed to restructure the banking facility, and are the terms ambiguous and unjust

[21] On this issue, learned counsel for defendants, Khor Poay Ying, argues that the reduction of the facilities from RM60m to RM58.8m resulted in the plaintiff gaining unreasonable profit from D1 as the *murabahah* sale price increased from the initial sum of RM85,847,239.80 to RM91,338,846.27. It is argued that such process is unclear and amounts to profiteering which goes against Shariah principles.

[22] The learned counsel for the plaintiff, Muhammad Nasim Shafie, has submitted that the plaintiff was duly entitled to restructure the banking facility. It is emphasised that this restructuring was conducted in a formal and proper manner, with D1 having executed all requisite documentation, with D2 and

D3 executing the required guarantees. Regarding the allegation that ambiguous and inequitable terms were introduced, leading to excessive charges, it is contended that the rise in the *murabahah* sale price is attributable to the extension of the loan tenure from its original period of 84 months to 105 months. This extension, in turn, resulted in an increase in profit charges corresponding to the prolonged duration of the financing arrangement.

[23] I am of the considered view that based on cl 24 B of the letter of offer dated 10 October 2019, it is clear that the plaintiff has the right to unilaterally amend and vary the terms of the facilities:

> 24. Other Terms and Conditions
>
> A. ...
>
> B. The Facility set out in this Letter of Offer is subject to review, amend or cancel at the sole and absolute discretion of the Bank at any times as it deems fit with notification to the Customer.
>
> ...

[24] A careful examination of the facility agreement dated 11 November 2019 reveals the presence of cl 21, which expressly confers upon the plaintiff the unilateral right to review and restructure the facility:

> 21. *VARIATION OF TERMS*
>
> 21.1 It is hereby expressly agreed and declared by the parties hereto that notwithstanding any of the provisions of this Agreement to the contrary, *the Bank may at any time at the Bank's absolute discretion without discharging in any way the Customer's liabilities hereunder and the other Transaction Documents vary and/or ad to the terms of this Agreement and/or the other Transaction Documents* including but not limited to the rate imposed by the authority, additional charges, compensation charges and any other charges herein stated and the amount or form of the Facility granted so as to convert the existing facility to another facility or to create two or more facilities from the Facility (provided always at the applicable profit rate) and such variation and/or addition shall take effect upon notice being given by the Bank to the Customer subject always to Shariah principles. Such variations and/or additions shall thereupon be deemed to have been varied and/or added accordingly, and shall be read and construed as if such variations and/or additions have been incorporated into and had formed part of this Agreement at the time of the execution hereof. (Emphasis added.)

[25] While the express provisions of the agreements vest the plaintiff with an unequivocal and unilateral discretion to review and restructure the terms of the banking facility, the plaintiff, in the present case, elected not to exercise such discretion unilaterally. Rather, a careful examination of the circumstances surrounding the documentation of the banking facility reveals that the restructuring was, in fact, undertaken through mutual consent.

[26] Pursuant to the terms set forth in the letter of offer (restructuring) dated 5 October 2020, a restructuring exercise was undertaken to mitigate the business and financial hardships faced by D1 during the COVID-19 pandemic. This arrangement granted D1 a 24-month grace period, during which no installment payments were required, thereby affording much-needed financial reprieve. In furtherance thereof, the original tenure of 84 months was extended to 105 months. While the *murabahah* profit rate remained unchanged at 2.0% + BFRpa, the applicable ceiling *murabahah* profit rate was reduced from 10.83%pa to 9.58%pa.

[27] Subsequently, through the second supplementary letter of offer dated 22 June 2021, the tenure was further extended to 111 months, with the grace period increased to 30 months. Thereafter, by way of the third and fourth supplementary letters of offer, dated 29 October 2021 and 8 September 2022, respectively, the monthly installments were further adjusted to a reduced amount, affording D1 additional financial reprieve.

[28] This restructuring framework, while supportive of D1's immediate financial needs, naturally led to an increase in profit charges. This was due to the accumulation of arrears during the extended grace period, which were carried forward and spread over the remaining term of the agreement, thereby extending D1's overall financial obligations.

[29] Further to this 30-month grace period, the plaintiff has issued second letter of notification dated 8 September 2022 in order to assist D1 by allowing the balance of the financial services reserve account ('FSRA') of approximately RM250,690 to be utilised to partly reduce the existing outstanding accrued profit under the banking facility, and to allow D1 to remedy the shortfall of FSRA requirement via 12 months installment commencing January 2023 (applicable for shortfall due to the payment of accrued profit).

[30] From the evidence presented, the defendants' claim that the plaintiff acted oppressively by increasing the profit rate despite reducing the facility amount lacks substantiation. In my considered view, the plaintiff has provided clear and comprehensive explanation as to how the calculations of the profit rate was made. The defendant on the other hand have failed to challenge this with credible evidence. Consequently, I am persuaded that the plaintiffs explanation on this issue is satisfactory and does not warrant further examination, allowing it to be appropriately resolved at this stage.

Whether the commodity *Murabahah* component of the banking facility breached shariah principles.

[31] The defendants' learned counsel argues that the banking facility violates Shariah principles as D1 was never informed of the specific commodities referred to in the commodity murabahah transaction. This breach, as argued by the defendants compounded by the lack of permission for the plaintiff to act as D1's agent in handling the said commodities. D1 also alleges that they were not informed of the fact that the 'commodity trading fee' was to be borne by them at the rate of 50%.

[32] On the contrary, the learned counsel for the plaintiff argues that the quantity of commodities was agreed upon by D1. This is argued to be evidenced by the *Murabahah* sale contracts dated 11 November 2019 and 25 November 2020 which were duly executed by D1. Proof of commodity transaction is argued to be conclusively proven by the availability of the e-certificates No CP011NOV19-0000167-000 and CPO25NOV20-0000246-000 were issued by Bursa Malaysia Islamic Services Sdn Bhd.

[33] On the issue of the lack of memorandum of articles to permit commodity trading, the plaintiff contends that it is a well-established legal principle that the sealing of security documents does not require D1's 'Memorandum of Articles,' especially since the documents were executed under seal of D1. The case of *JKT Petroleum Sdn Bhd & Ors v T & O Resources Sdn Bhd* [2016] 7 MLJcon 52 (HC) is cited to support this point.

[34] On the issue of the defendants' claim of lack of agency document to allow the plaintiff to conduct the commodity transaction as well as to equally share (50:50) the commodity trading fee, the plaintiff contends that D1 had agreed to the same based on terms of the executed agreements.

[35] At the outset, I observe that no complaint has been lodged, nor any enforcement action undertaken by Bank Negara Malaysia against the plaintiff in respect of the alleged breach of Shariah principles. It is noteworthy that the defendants' objection appears to have emerged solely in response to the plaintiff's commencement of legal proceedings against them.

[36] To analyse the argument on Shariah compliance, cll 11.2, 13.1, 13.5, 13.6, 13.7, 13.8, 13.9, 13.11, 13.13, 13.14 and 23.4 of *Bank Negara Malaysia's Policy on Murabahah-based financing*, published on 23 December 2013 (Ref: BNM/RH/STD 028-4), are relevant in assessing what is required to be proven in respect of commodity *murabahah* transactions:

> 11.2 The specific inherent nature of the contract of murabahah is the sale contract which is based on the element of trust in disclosing the cost and mark-up. The common *inherent nature of a sale contract is the transfer of ownership of the asset from the seller to the purchaser.*
>
> ...

13.1 *Asset to be traded in a murabahah contract shall meet the following conditions*: A

(a) the *asset is recognised by the Shariah, valuable, identifiable and deliverable*; and

(b) the *asset is already in existence and owned by the seller.*

...

13.5 *The ownership in the murabahah asset must be effectively transferred from the seller to the purchaser.* B

13.6 The transfer of ownership is effected upon entering into a valid sale and purchase contract even though there is no legal registration of the 13.5 ownership, provided that the sale and purchase is supported by *evidence of transaction*.

13.7 The transfer of ownership shall take effect by the *seller disposing of the right of ownership* (*takhliyah*) resulting in the purchaser having *access to the asset* (*tamkin*) and assuming its risk through any mechanism permitted by the Shariah and generally accepted by customary business practices (*'urf tijari*). C

13.8 Possession of the asset shall either be in the form of p*hysical possession* (*qabd haqiqi*) or *constructive possession* (*qabd hukmi*). D

13.9 Pursuant to paragraph 13.8, the *rights and liabilities of the purchaser as the owner of the asset shall be established upon his possession* of the asset.

13.11 Multiple murabahah contracts shall not be entered into simultaneously on the same asset. E

13.13 *Any defect in the asset which is discovered and consented to by the purchaser at the time of entering into the contract shall disqualify the purchaser from entitlement to the defect option (khiyar al-ayb) with respect to the defect.*

13.14 *Any defect in the asset which occurred before entering into the contract but is discovered after entering into the contract shall entitle the purchaser to the defect option (khiyar al-ayb).* F

...

23.4 *IFI shall ensure* that the order or application by the customer for the purchase of asset is *supported by a written document. At minimum, the document shall outline the following*: G

(a) *description and quantity of the asset to be acquired*;

(b) *estimated purchase price*; and

(c) *proposed supplier of the asset* (if applicable). (Emphasis added.)

H

[37] On the issue of certainty and avoidance of *gharar*, this court is of the view that there is certainty in the subject matter as the e-certificates were issued by Bursa Malaysia Islamic Services Sdn Bhd ('BMIS') which is a commodity murabahah House ('CMH') approved by Bank Negara Malaysia. In essence, BMIS is a commodity trading platform specifically established to facilitate Islamic liquidity management and financing for Islamic financial institutions. Conceived as a national project, BMIS represents the collaborative efforts of Bank Negara Malaysia, the Securities Commission of Malaysia, Bursa Malaysia Bhd, and key industry stakeholders, in support of an initiative spearheaded by I

A the Malaysia International Islamic Financial Centre.

[38] Specific to its role in the Islamic finance, the relevant ruling of the Bank Negara Malaysia's Shariah Advisory Council pertaining to such online commodity platform would be the ruling issued during its 78th Meeting held on 30 July 2008 have resolved that the operational structure of a commodity murabahah House is permissible on the condition that the traded crude palm oil shall be identifiable and precisely determinable in terms of its location, quantity and quality (see: *Shariah Resolutions in Islamic Finance* (2nd Ed) Bank Negara Malaysia (2010)).

[39] According to *Shariah Resolutions in Islamic Finance, Bank Negara Malaysia*, commodity *murabahah* is characterised as a *mu'amalah* comprising two stages of transaction. In the first stage, the buyer purchases an asset on credit from the original seller. In the second stage, the buyer sells the asset on a cash basis to a third party. This arrangement is termed commodity murabahah because the buyer acquires the asset on credit not with the intention of utilising or benefiting from it, but with the objective of selling it to obtain liquidity.

[40] This method of obtaining liquidity or financing is explicitly outlined in cl 4 of the letter of offer dated 10 October 2019 which provides as follows:

> 4. *Underlying Shariah Concept & Definition*:
>
> Tawarruq (Commodity Murabahah).
>
> Whereby the Customer requests to purchase the Commodity of which details are annexed in Schedule 3 hereof and the *Customer promises (wa'd) to purchase the Commodity from the Bank* at the Bank's Sale Price (cost plus profit) ('Murabahah Sale Price') on deferred term upon the Bank's receiving all rights, titles and benefits to the Commodity.
>
> Subsequently, the *Customer appoints the Bank as its agent to sell the Commodity* to a commodity trader or a party other than the Bank, at the Bank's Purchase Price (cost) for immediate payment. (Emphasis added.)

[41] Further, based on cll 1 and 4 of Section 2 (Standard Terms and Conditions) of the letter of offer dated 10 October 2019, D1 have made the required purchase request, appointed the plaintiff as agents to transact the said commodity, and agreed to equally share (50:50) the commodity trading fees. Both clauses are repeated herein for ease of reference:

> 1. *Underlying Shariah Concept: Tawarruq (Commodiy Murabahah)*
>
> Whereby the *Customer requests the Bank by issuance of a Purchase Request (as per the format of the Facility Agreement) to purchase a commodity stated*('the Commodity') and promises (wa'd) to purchase the Commodity from the Bank at the Bank's Sale Price (cost plus profit) ('Murabahah Sale Price') on deferred term upon the Bank's

receiving all rights, titles and benefits to the Commodity.

Subsequently, *the Customer appoints the Bank as its agent to sell the commodity to a commodity trader* or a party other than the Bank, at the Bank's Purchase Price (Cost) for immediate payment.

The Customer also authorises the Bank to collect and thereby remit the collections therefrom to the Customer at designated account(s) and/ or other parties/accounts as may be instructed by the Customer in the manner set out in the Facility Agreement and such amount paid to the Customer shall be deemed to form part of the Facility made hereunder and the acknowledgment or receipt of such parties shall be deemed as if the same had been made or given by the Bank.

4. *Commodity Trading Fee*: To be determined at the point of each Murabahah sale.

*Note: *The Commodity Trading fee shall be shared equally (50:50) between the Bank and the Customer accordingly.*(Emphasis added.)

[42] Therefore, I am of the view that D1 is deemed to have consented to the commodity transaction, the appointment of the plaintiff as agent, as well as to equally share the commodity trading fee. Further to this, it is important to emphasise that D1 as the purchaser of the commodity retained the right to terminate the contract under cl 13.15 of *Bank Negara Malaysia's Policy on Murabahah-based financing* which expressly provides that:

13.15 Pursuant to 13.14, the purchaser has the right to terminate the contract. Alternatively, the purchaser may choose to continue with the contract as it is or with any mutually agreed variations of the terms of the contract.

[43] D1's inaction, particularly their silence after receiving the funds under banking facility duly raised through the commodity murabahah financing arrangement, can only be construed as an implicit acknowledgment of the transaction's validity. D1 cannot now seek to challenge the very transaction from which they have benefited without having exercised their right to terminate as provided under cl 13.15.

[44] Further, I am of the considered view that D1's assertion that its company seal was not affixed to the agency contract (*wakalah*) dated 11 November 2019 and the *wakalah* agreement (restructuring) dated 25 November 2020 is devoid of merit. The said agreements were prepared on D1's own letterhead and duly executed by its directors, thereby evincing clear and unequivocal authority on the part of D1 in entering into these arrangements. As such, the absence of a company seal does not, in any manner, vitiate the validity or enforceability of the agreements (see exh NBN7 of the plaintiff's affidavit in reply (encl 37)).

[45] There is also no evidence before this court to suggest that D1 ever sought delivery of the underlying commodity either before or after the

transaction. To place the matter in its proper context, had D1 insisted on taking possession of the crude palm oil rather than the funds generated through its sale, it would have amounted to 16,243 tons in weight. This volume, translating to approximately 18,255 cubic meters, would require transportation by approximately 731 tanker trucks, each capable of carrying 25 cubic meters of oil. The sheer impracticality of such an arrangement underscores the absurdity of D1's contention of their rights over the commodity, as it defies both commercial logic and the very purpose of the *murabahah* transaction, which was clearly intended to provide liquidity through the sale of the commodity, not its physical delivery.

[46] In light of the foregoing, and upon careful consideration of the particulars stated in the e-certificates, I am of the view that the commodity murabahah transaction was fully disclosed, with all requisite details. There is no indication of any concealment or failure to inform D1 of their rights or the specifics of the transaction. Thus, considering D1's failure to assert their rights under the relevant clauses, including the right to request delivery or the right to terminate, the transaction is deemed valid and binding. Therefore, the issue at hand is not one that raises any genuine triable dispute.

[47] Should the e-certificates from BMIS be considered insufficient proof of commodity murabahah transaction and therefore deemed Shariah non-compliant, I am of the considered view that such a provision, forming financial institution's duty to comply with Shariah principle and the rulings of SAC under s 28 of Islamic Financial Services Act 2013 ('the IFSA 2013'), does not operate to nullify the contractual terms agreed upon between the plaintiff and D1. This is so as laws relating to finance and banking matters are included under item 7(j) of the Federal List (List I) in the Ninth Schedule to the Federal Constitution, which is to be governed by statute law and common law (including English law).

[48] Furthermore, s 281 of the IFSA upholds the sanctity of contracts, even where, on its face, such enforcement appears to be at odds with the guidelines and regulatory framework established under the IFSA:

> 281 Breach or contravention not to affect contract, agreement or arrangement
>
> Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention:
>
> Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.

[49] Specific to summary judgment application the Court of Appeal in

Maybank Islamic Bhd v Golden Base Construction Sdn Bhd & 2 Ors (W-02(IM)(MUA)-1035–06 of 2019) (unreported) (CA) have held that, applying s 281 of the IFSA 2013, a breach of Shariah principle alone does not render the existence of a triable issue in a summary judgment application.

[50] Applying this to our case, the main objective of the commodity murabahah transaction is to raise cash, which is eventually disbursed to the borrower. Since the cash of RM58.8m was indeed raised and made available to D1, the method of raising such cash — even if it allegedly did not fully comply with Shariah principles — does not undermine the validity of the contract. Essentially, under laws relating to finance and banking matters, the method by which a bank procures funds for its customers does not affect the legal validity of a facility agreement.

Whether the demand for arrears, coupled with the subsequent termination letter, is defective

[51] The defendants' learned counsel contends that the demand is flawed due to a mischaracterisation of loan sum, as both letters erroneously reference the amount of RM60m. It is asserted that the correct title should have reflected the restructured amount of RM58.8m.

[52] Conversely, the plaintiffs learned counsel counters this argument by pointing out that the court has already addressed this matter during the striking-out application in encl 19 and therefore res judicata based on the Supreme Court's decision in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 (SC). In its ruling, this court has determined that both the letter of demand and the termination notice remain valid, notwithstanding the discrepancy in the quantum of loan stated.

[53] I am of the view that the positive assertion that both letters were issued according to contract, ie by registered post, is not denied or rebutted by the defendants. The letters are therefore deemed served pursuant to cl 6.2(b) of the facility agreements. The only issue is whether such reference to a different amount of loan renders the letters defective.

[54] Having previously addressed the implications of the error when I dismissed the defendants' application to strike out the plaintiff's writ and statement of claim, the matter is now res judicata. As detailed in encl 19, my findings confirm that the core demand — pertaining to the sum due during arrears and upon recall — was accurately calculated and clearly understood by the defendants. This is further supported by the facility agreements, which defines D1's 'event of default' under cl (a) of Schedule 3 as a 'default in the payment of any amount due and payable under the Transaction

Documents'. Additionally, pursuant to cl 4 of the guarantees, D2 and D3 were obligated to make payment of the sum demanded within seven days of receiving the letter of demand.

[55] From the evidence, I observed that the defendants' understanding of the contents of the impugned correspondence was substantiated by the affidavit evidence submitted during the proceedings related to encl 19, as well as by the substance of their responses vide letters dated 1 June 2023 and 16 November 2023 would show that they have unconditionally admitted to the debt and had requested the plaintiff not to terminate the banking facility (exh NBN9 of encl 37).

[56] In the case of *Malaysia Airports Sdn Bhd v APFT Land Sdn Bhd* [2018] 10 MLJ 257 (HC) Mohd Shariff JC, in finding that there was an admission which secures the plaintiff's claim for summary judgment referred to the decision of Abdul Malik Ishak J (as His Lordship then was) in *Malayan Banking Berhad v Red Box (Malaysia) Berhad* [2000] MLJU 108 (HC) which states as follow:

> *... An admission of a particular fact may either be express or implied. In whatever form it takes, the admission must be clear and unequivocal* (*Ellis v Allen* [1914] 1 CH 904 at p 909; *Ash v Hutchinson & Co (Publishers) Ltd* [1936] Ch 489 at p 503; and *Technistudy Ltd v Kelland* [1976] 1 WLR 1042; [1976] 3 All ER 632 (CA)). *Thus, if a defendant admits a document but does not admit its full contents, the plaintiff may still succeed by obtaining judgment if the document, on production, clearly establishes and supports the plaintiffs claim* (*Barnard v Wieland* (1882) 30 WR 947; *Rutter v Tregent* (1879) 12 Ch D 758; (1884) 28 Ch D 650). There was clear admission on the part of the respondent to the whole debt and the petitioner must not be restrained from advertising the petition. This was my judgment and I so hold accordingly. Lest I be accused of an oversight, the judgment of that brilliant judge — Hashim Yeop A Sani CJ (Malaya) (as he then was) in *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 should be put to the fore. In that case, that brilliant judge held that prima facie a creditor is entitled to petition for a winding up against a company which fails to pay its debt. His Lordship further held that the creditor should not be prevented from pursuing its petition so that the court would be able to consider all the evidence and determine whether it should exercise its discretion to order a winding up or not ... (Emphasis added.)

[57] In the present case, D1's letters dated 1 June 2023 and 16 November 2023 constitute an unequivocal admission, as they were not marked 'without prejudice' and were not made in the context of a genuine dispute between the parties. Instead, these letters merely reflect D1's request for the reinstatement of the banking facility, coupled with an appeal for a variation in payment terms and an extension of time for payment. In line with the House of Lords' decision in *Bradford & Bingley plc v Rashid* [2006] 4 All ER 705 (HL), a letter offering

to pay a reduced amount in response to a debt claim was deemed not to be 'without prejudice', even if it carried that label (see also *CIMB Bank Bhd v Comsa Layer Farms Sdn Bhd & Anor* [2011] 2 MLJ 118 (HC) on the issue of unconditional admission to settle debt due).

[58] Therefore, I concluded that the scrivener's error regarding the loan sum in the aforementioned correspondence did not render it defective, since the body of the letters clearly stated the correct amounts due. Additionally, it was clear that the defendants were cognisant of the existence of the banking facility and were actively involved in the restructuring process that ensued. Accordingly, this issue vis-a-vis the validity of the demand under the banking facility as well as the guarantees does not amount to a triable issue.

Whether the plaintiffs claim is substantiated by the certificate of indebtedness

[59] On the issue of the correctness of the amount claimed, learned counsel for the defendant contends that the sum demanded and prayed in the statement of claim is incorrect due to the imposition of unlawful charges which consists of the *Murabahah* profit rate as well as the *ta'widh* (compensation charges). Additionally, counsel argues that the plaintiff failed to incorporate the element of *ibra*' or rebate in determining the amount due. This form the basis of the defendants' vehement denial of the amount claimed in the certificate of indebtedness and their assertion that the calculation is erroneous and inconsistent with the terms of the original contract.

[60] The learned counsel for the plaintiff on the other hand argues for the strict application of conclusive evidence clauses within the facility agreements as well as the guarantees. Proof of quantum has been agreed to be based on a certificate of indebtedness certifying amount due as at 6 November 2023 which in absence of manifest error would be deemed conclusive evidence of the amount stated to be due (see exh NBN8 of encl 34). On the specific issue of the *murabahah* profit rate and *ta'widh*, it is argued that the same has been agreed and duly implemented according to the agreements. As to the issue of *ibra'*, it is simply argued that the same is only to be granted on the condition of early or full settlement of the loan.

[61] On this issue of quantum, I find that the facility agreements contain conclusive evidence clause pertaining to the bank's statement and certification. This can be seen in cll 18.2 and 24 of the facility agreements which states as follows:

> 18.2 Statement of Account
>
> A statement of account in writing stating the amount payable by the Customer under the Facility and/or under the Transaction Documents and indication as to how such amount has been calculated and duly certified by any authorised officer of

A the Bank shall in the absence of manifest error be conclusive that such amount is in fact due and payable by the Customer including for the purpose of legal proceedings.

24. EVIDENCE OF INDEBTEDNESS

B In any proceedings relating to this Agreement a statement as to any amount due to the Bank under this Agreement giving reasonable details of the basis of calculation or determination of that amount and which is certified as being correct by an officer of the Bank, unless otherwise provided in this Agreement and in the absence of manifest error, be conclusive evidence that such amount is in fact due and payable.

C **[62]** Whereas cl 2(n) of the guarantees stipulate as follows:

2. GUARANTOR'S COVENANTS

The Guarantor hereby agrees, undertakes and covenants with the Bank as follows:-

D ...

(n) Conclusive Evidence

that a written statement from the Bank as to the amount due and owing by the Customer shall be accepted by the Guarantor as conclusive evidence that the amount thereby appearing is due from the Customer to the Bank and payable on E demand to the Bank by the Guarantor.

[63] Conclusive evidence clauses operate to establish that a determination of the amount owed by a debtor is, for all intents and purposes, final and binding F as to the sum payable. Such provisions effectively preclude the need for protracted inquiries into the precise calculation of outstanding debts, sparing the parties the necessity of combing through financial records in search of potential discrepancies.

G **[64]** In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC) at p 284, the Federal Court held that the indebtedness of the borrower may be ascertained conclusively by such certificate:

In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of H the actual indebtedness of the respondents. Clause 19 provides thus 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives'. *It means that, for the purpose of fixing liability of the respondents, the company's* I *indebtedness may be ascertained conclusively by a certificate*: see *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643; *Bache & Co v Banque Vernes* [1973] 2 LLLR 437.

In the circumstances the respondents are bound under cl 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive

evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.(Emphasis added.)

[65] Lord Denning MR in *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris* [1973] 2 Lloyd's Rep 437 (CA) had this to say at p 440:

[t]hat, as a matter of principle, the conclusive evidence clause was binding according to its terms and, if notice of default was given in pursuance of the conclusive evidence clause it was binding according to its terms, the clause was not contrary to public policy.

[66] The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* through the judgment of Steve Shim CJSS quoted with approval of the case of *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 (HC), where the High Court of Australia made the following observation:

... The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate ... But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.

[67] Steve Shim CJSS in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* also held that 'a certificate of indebtedness operates in the field of adjective law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disapprove the amount claimed' (at para 11).

[68] The reference to 'manifest error' nevertheless would allow a comeback if there is a material mistake in the calculations. In the case of *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 (CA), the English Court of Appeal held as follows:

83. Is this a case of manifest error? There are two helpful recent authorities on this issue, namely I*IG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542; [2008] 2 All ER (Comm) 1173 and *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230; [2012] Ch 31.

84. *IIG* was a claim for payment against guarantors. The defendants had bound themselves to pay on demand, absent manifest error. Lewison J, the trial judge, rejected the suggestion that there was manifest error. He said that a manifest error was *'one that is obvious or easily demonstrable without extensive investigation'*. The Court of Appeal approved the judge's approach to that issue and upheld his

decision: see the judgment of Waller LJ at [33] to [35]. Lawrence Collins and Rimer LJJ agreed.

85. North Shore was an action by a lender against the two guarantors of the loan. Clause 3.4 of the guarantee stated that a certificate signed by the claimant for the amount of the indebtedness was conclusive evidence against the guarantors, unless manifestly incorrect. The Court of Appeal approved the test for manifest error formulated by Lewison J in IIG. The court held that the certificate was invalidated by manifest error, because it did not take into account an agreed variation in the rate of interest.

86. At [61] Smith LJ said:

> On reflection I have come to the conclusion that for a party to rely on a manifest error in a certificate does not depend upon his ability to demonstrate the error immediately and conclusively. *In the present case, the guarantors were able to recognise immediately that the certificate was based upon the interest rates as set out in the original loan agreement and not as varied in November 2004. They could see that it was manifestly incorrect They could not immediately demonstrate that conclusively; they could not do so until the court had determined the issue of variation. But they were right, as this court has now held. I would hold that the certificate was manifestly incorrect and was of no effect.*

87. Finally, in relation to the law, I should refer to *IG Index v Colley* [2013] EWHC 748 (QB). In a very thorough judgment Stadlen J reviewed the authorities on manifest error. At [813] to [814] he held that *the court could have regard to extrinsic evidence.*

[69] This principle is reaffirmed in the recent judgment of *Flowgroup plc (in liquidation) v Co-Operative Energy Ltd* [2021] EWHC 344 (Comm) (HC), wherein the English High Court held that for a challenge based on a manifest error clause to succeed, there must be a plain and obvious mistake. However, whether such an error has indeed occurred is a matter of fact, and need not be glaringly apparent from the face of the certificates themselves. In the of *Flowgroup Pic v Co-Operative Energy Ltd* the error in issuing the certificates only came to light once the underlying contractual obligation was properly scrutinised.

[70] In applying these authorities, it is clear that in determining the existence of a manifest error, consideration must be given to the fact that certain errors may only come to light upon the court reaching a specific legal conclusion. Although it may not be feasible to demonstrate the errors as 'immediately and conclusively' incorrect at first glance, they may nevertheless still amount to manifest errors.

[71] In the present case, neither the principal borrower nor the guarantors raised any objections to the quantification of the debt. Nevertheless, guided by the authorities cited earlier, it is incumbent upon this court to scrutinise the

certificate issued with due care, ensuring not only that they are free from manifest errors but also that the calculation of such charges free from the element of misconduct, negligence and/or breach of the terms and conditions outlined in the facility agreements.

[72] As to the issue of *murabahah* profit rate, cl 8 of Appendix 1 of the supplementary letter of offer (restructuring) dated 5 October 2020 provides as follows:

> 8. Profits: BFR + 2.00% p.a
>
> (Current BFR is 5.58%)
>
> A ceiling profit rate of 9.58% shall be used to calculate the Restructured Murabahah Sale Price.

[73] As to the issue of *ta'widh*, cl 18 of the facility agreements provides as follows:

> 18. COMPENSATION FOR LATE PAYMENT
>
> 18.1 Compensation for Late Payment (Ta'widh)
>
> (a) In addition to and without prejudice to the Bank's rights powers and remedies in this Agreement and the Transaction Documents, the Customer shall be liable to pay the Bank compensation on any amount overdue as follows:
>
> (i) If the default occurs during the tenure of the Facility, at the rate of one percentum (1%) per annum on such overdue instalment under the Facility or on such outstanding balance of the Facility in the case of default causing the entire Facility to be recalled or brought to court for judgment prior to maturity, whichever applicable, or any other method approved by the Bank's Shariah Committee and/or Shariah Advisory Council of BNM; and
>
> (ii) if the default occurs after the maturity of the Facility as provided or upon judgment, whichever is earlier, at the rate to be calculated from the date of the default payment which is after the maturity date of the Facility and which rate shall not be more than the prevailing daily overnight Islamic Interbank Money Market (IIMM) rate on the outstanding balance of the Murabahah Sale Price.
>
> (b) It is further agreed that the compensation shall not be compounded,
>
> (c) The compensation at the aforesaid rate shall be payable by the Customer after as well as before any judgment or order of court.'

[74] As to the issue of *ibra*' cl 2.6 (i) of the facility agreements provides as follows:

> ...
>
> For any avoidance of doubt, subject to the provisions of Shariah law, t*he Bank shall grant an Ibra' (Rebate) to the Customer in the event the Customer makes early settlement or redemption of the Murabahah Sale Price* where the Customer has made the

A installment payments diligently. The Ibra' (rebate) is calculated based on the following formula:

Early Settlement Amount = Outstanding Murabahah Sale Price – Ibra' + *Late Payment Charges (if any)*

Ibra' = Deferred Profit + Undisbursed Principal (if any) – Other Charges (if any)

B Ibra' means deferred profit which has not been accounted as profit earned. Any Ibra' granted by the Bank shall be deemed as final and conclusive and the Customer agrees as to the accuracy of the Ibra' granted without contestation or dispute. (Emphasis added.)

C **[75]** In the present case, I am of the considered view that the *murabahah* profit rate and the provision as to *ta'widh* have been agreed to between parties and therefore should be enforced. On the issue of *ibra'* as the matter pertains to a default, the applicability of cl 2.6(i) above is beyond question. It follows that the plaintiff's duty to grant *ibra'* arises only upon the D full settlement of the outstanding sum by D1 or its guarantors, D2 and D3. Consequently, the contention that *ibra'* should have been factored into the current calculation of the amount due is without merit, as the precondition for such a rebate has not been satisfied.

E **[76]** Upon a thorough review of the certificate of indebtedness, and after comparing it with the amounts claimed during the demand for arrears and upon termination, I find no manifest errors, or the occurrence of negligence, misconduct or breaches of terms on the plaintiff's part. Accordingly, I conclude F that this issue does not raise any triable matter warranting further judicial scrutiny.

DECISION

G **[77]** For the reasons traversed above, I have allowed the plaintiff's application for summary judgment against the defendants, as prayed in encl 30 with costs of RM8,000.

Summary judgment against the defendants for the sum of RM82,516,398.43 as at H *6 November 2023 with the applicable ta'widh (compensation charges) granted.*

Reported by Ashok Kumar

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